Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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No. 87-996

In The

Supreme Court of the United States

October Term, 1987

COIT INDEPENDENCE JOINT VENTURE,

Petitioner,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari filed December 14, 1987
Certiorari granted March 7, 1988

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DISTRICT COURT RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1986		
Dec. 31	1	PETITION FOR REMOVAL w/attached state court papers (FSLIC as receiver for Firstsouth, F.A.) (15+) pm
1987		
Feb. 19	4	MOT OF FSLIC TO DISMISS PLTF'S COMPLAINT (4). (FSLIC). tn
Feb. 25	6	ORDER . . . The FSLIC has been appointed as receiver for Firstsouth. The Mot of the FSLIC to Dismiss the Pltf's Complaint is Granted. cys. to cnsl. JB/tn
Mar. 18	10	COIT INDEPENDENCE JOINT VENTURE'S MOTION FOR RECONSIDERATION AND RESPONSE TO MOTION OF FSLIC TO DISMISS (5) m
Mar. 27	12	NOTICE OF APPEAL by Plaintiff COIT INDEPENDENCE JOINT VENTURE from the Order dismissing action on February 25, 1987. (2) g
Apr. 9	15	ORDER: That Plaintiff's motion to reconsider and vacate and its motion to remand shall be and hereby are DENIED, and it is further ORDERED that the court's order of February 25, 1987 dismissing this action shall not be disturbed. Dckt 4-8-87 cc to counsel JB/trw
Apr. 7	14a	FSLIC'S RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION (8).
Apr. 23	16	NOTICE OF APPEAL by plaintiff Coit Independence Joint Venture from the order dismissing pltf's action on February 25, 1987 and the order denying pltf's motion to reconsider and vacate and its motion to remand entered herein on April 9, 1987. (1) TO given to attorney at counter. trw

FIFTH CIRCUIT RELEVANT DOCKET ENTRIES

2/10/88 Flg. Order denying mot. of appellant to recall the Court's mandate. Further denying mot. of appellant to enlarge the time for flg. a pet. for rehearing and sugg. for rehearing en banc. (SDJ)

3/ 7/88 (X) Cert. Pet. Granted

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Coit Independence Joint Venture	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	
	)	CA3-86-3185-R
FIRSTSOUTH, F.A.,	)	
Defendant.	)	

PETITION FOR REMOVAL

(Filed Dec. 31, 1986)

The Federal Savings and Loan Insurance Corporation ("FSLIC"), as Receiver for FIRSTSOUTH, F.A. ("FIRSTSOUTH"), by its counsel, appearing specially, waiving no rights, and without consenting to be sued, petitions this Court to remove the above-entitled action and in support of this petition states as follows:

1. The above-entitled action is now pending in the District Court for Dallas County, 95th Judicial District as Case No. 86-14274-D. Copies of pleadings served on the defendant in that action are attached hereto in accordance with 28 U.S.C. § 1446(a).

2. This Court has original jurisdiction over the above-entitled action under the provisions of 12 U.S.C. § 1730(k)(1) and 28 U.S.C. §§ 1331 and 1346. It may be removed to this Court by the Receiver pursuant to 12 U.S.C. § 1730(k)(1)(C) and 28 U.S.C. § 1441. The basis for this Court's original jurisdiction and for removal are set forth in the following paragraphs in accordance with the requirements of 28 U.S.C. § 1446(a).

(a) Prior to December 5, 1986, FIRSTSOUTH was a federally-chartered savings and loan association. On December 5, 1986, FSLIC was appointed by the Federal Home Loan Bank Board ("FHLBB") as Receiver for FIRSTSOUTH, pursuant to 12 U.S.C. § 1464(d)(6)(A) and 12 U.S.C. § 1464(d)(6)(B)(i) on several grounds including that FIRSTSOUTH was insolvent within the meaning of 12 U.S.C. § 1464(d)(6)(A)(i). Pursuant to federal law, FSLIC as Receiver is a party to this proceeding. 12 C.F.R. § 547.7. A copy of the FHLBB Resolution appointing the FSLIC as Receiver for FIRSTSOUTH is attached hereto as Exhibit A.

(b) Pursuant to 12 U.S.C. § 1730(k)(1)(B), "any civil action, suit, or proceeding to which the [FSLIC] shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy." Section 1730(k)(1)(C) further provides that (except for one exception not applicable to this case) "the [FSLIC] may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect." FSLIC, therefore, has an absolute right to remove this action and need not post a bond or other security.

(c) As an additional basis for federal jurisdiction, the FSLIC is an agency and instrumentality of the United States, 12 U.S.C. § 1437(b), 12 U.S.C.

§ 1730(k)(1). This Court therefore has original jurisdiction under 28 U.S.C. § 1346 and this action may be removed pursuant to 28 U.S.C. § 1441.

3. In accordance with 28 U.S.C. § 1446(b), this petition is filed within 30 days of the appointment of FSLIC as Receiver for FIRSTSOUTH upon which removal of this action is based.

WHEREFORE, Petitioner prays that the above-entitled action now pending against FSLIC as Receiver for FIRSTSOUTH in the District Court for Dallas County, 95th Judicial District Court be removed to this Court.

Respectfully Submitted,

By: /s/ Kenneth E. Johns, Jr.
KENNETH E. JOHNS, Jr.
2020 LTV Center
2001 Ross Avenue
Dallas, Texas 75201-2916

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by Certified Mail, Return Receipt Requested, to counsel of record, as follows, on this 30th day of December, 1986.

/s/ Kenneth E. Johns, Jr.
Kenneth E. Johns, Jr.

CERTIFIED MAIL

Mr. J. L. Gueck
Akin, Gump, Strauss,
Hauer & Feld
4100 First City Center
1700 Pacific Avenue
Dallas, Texas 75201-2618

Mr. Paul E. Galvin
Akin, Gump, Strauss,
Hauer & Feld
4100 First City Center
1700 Pacific Avenue
Dallas, Texas 75201-2618

COUNTY OF PULASKI)
) SS.
STATE OF ARKANSAS)

Verification

Donna R. Harrigan, having been sworn on oath deposes and states that (1) she is the Special Representative for the Federal Savings and Loan Insurance Corporation, (2) she is authorized to make this affidavit, (3) she has read the foregoing petition, and (4) the facts set forth therein are true and correct to the best of her knowledge.

/s/ Donna R. Harrigan

Subscribed and sworn to
before me this 10th day
of December, 1986.

/s/ Sherrie LuDan
Notary Public

My commission expires:
11 April 1992

FEDERAL HOME LOAN BANK BOARD

(EAGLE)

To all to whom these presents shall come, Greeting:

I CERTIFY That hereto annexed are true copies of documents described below made from records of the Federal Home Loan Bank Board, which records are in the

official custody of the Secretary to said Board and are on file in its offices at 1700 G Street, Northwest, Washington in the District of Columbia, to wit:

Federal Home Loan Bank Board Resolution No. 86-1200, dated December 4, 1986

(SEAL)

In testimony whereof, I, Melanie Daly, Assistant Secretary to the Federal Home Loan Bank Board have hereunto caused the Seal of said Board to be affixed and my name subscribed hereto, in the District of Columbia, this 4th day of December, 1986.

/s/ Melanie Daly
Assistant Secretary to the
Federal Home Loan Bank Board

EXHIBIT A

FEDERAL HOME LOAN BANK BOARD

Appointment of Receiver for
First South, F.A.,
Pine Bluff, Arkansas

No. 86-1200 P

Date: December 4, 1986

WHEREAS, FirstSouth, F.A., Pine Bluff, Arkansas ("Association"), is a federally-chartered stock savings and loan association, the accounts of which are insured by the Federal Savings and Loan Insurance Corporation ("FSLIC"); and

WHEREAS, The Federal Home Loan Bank Board ("Bank Board") has exclusive power and jurisdiction to appoint the FSLIC as sole conservator or receiver for a

Federal savings and loan association in the event that the Bank Board determines that any of the grounds specified in § 5(d)(6)(A)(i), (ii), (iii), (iv) or (v) of the Home Owner's Loan Act of 1933, as amended ("HOLA"), 12 U.S.C. § 1464(d)(6)(A)(i), (ii), (iii), (iv) or (v) (1982), exists with respect to such association; and

WHEREAS, Pursuant to § 5(d)(6)(D) of the HOLA, 12 U.S.C. § 1464(d)(6)(D) (1982), the Bank Board shall appoint only the FSLIC as receiver for a Federal savings and loan association; and

WHEREAS, The Bank Board has considered staff memoranda dated December 4, 1986, together with accompanying attachments and exhibits (copies of which memoranda are in the Minute Exhibit File), and the balance of the administrative record submitted to it:

Grounds for Appointment

NOW, THEREFORE, IT IS RESOLVED, That, the Bank Board finds, on the basis of the record before it, including, but not limited to, oral presentations before the Bank Board, that the grounds specified in § 5(d)(6)(A)(i), (ii) and (iii) of the HOLA, 12 U.S.C. § 1464(d)(6)(A)(i), (ii) and (iii) (1982), exist with respect to the Association in that (i) the Association is insolvent in that its assets are less than its obligations to its creditors and others, including the holders of its withdrawable accounts, (ii) the Association has incurred substantial dissipation of assets or earnings due to violations of law, rules, and regulations and to unsafe and unsound practices, and (iii) the Association is in an unsafe and unsound condition to transact business; and

Consent to Appointment

RESOLVED, FURTHER, That the Bank Board finds that, by a Consent Agreement dated November 14, 1986, executed by the board of directors of the Association, the Association has consented to the appointment of a conservator, receiver, or other legal custodian for the Association; and

Appointment of Receiver

RESOLVED FURTHER, That the Bank Board, pursuant to § 5(d)(6)(A) of the HOLA, 12 U.S.C. § 1464(d)(6)(A) (1982), and pursuant to section 5(d)(6)(B) of the HOLA, 12 U.S.C. 1464(d)(6)(B) (1982), hereby appoints the FSLIC as sole receiver for the Association ("Receiver") for the purpose of liquidation; and

Powers and Duties of Receivers

RESOLVED FURTHER, That the FSLIC as Receiver shall have and exercise all powers, rights, and privileges, and shall assume, perform, and discharge all duties, responsibilities, and obligations of a receiver for a Federal savings and loan association accorded or imposed by, and subject to, applicable provisions of law and regulations and orders of the Bank Board, including, but not limited to, § 5(d) of the HOLA, 12 U.S.C. § 1464(d) (1982), section 406 of the National Housing Act, as amended, 12 U.S.C. § 1729 (1982), and the provisions of Parts 547 and 549 of the Rules and Regulations for the Federal Savings and Loan System ("Federal Regulations"), 12 C.F.R. Parts 547 and 549 (1986); and

RESOLVED FURTHER, That, in addition to all powers and authority of a receiver provided for by law, regulation,

and order, the Receiver is hereby authorized and empowered, and need not seek further approval from the Bank Board, to borrow money in such amounts from any source and in any manner as the Receiver requires to fulfill its duties as receiver, to execute, acknowledge, and deliver evidence of indebtedness for such borrowings, and to secure repayment of such borrowings by mortgages, pledges, and assignments in trust, or hypothecation of any property of the Association, *provided* that the form of any contract or security agreement for such borrowings shall be approved by the Office of the General Counsel ("OGC"); and

RESOLVED FURTHER, That the Receiver, in exercising its power of sale pursuant to § 549.3(b)(4) of the Federal Regulations, 12 C.F.R. Part 549.3(b)(4) (1986), may make loans to facilitate the sale of property of the Association, *provided* that any such loans may not include any amount attributable to future interest, fees, or expenses; and

RESOLVED FURTHER, That the Receiver need not furnish any bond; and

RESOLVED FURTHER, That, notwithstanding the provisions of § 548.1, as made applicable by § 549.2, of the Federal Regulations, 12 C.F.R. §§ 548.1 and 549.2 (1986), the Receiver may elect to notify by certified mail all persons and entities that the Receiver knows to be holding or to be in possession of assets of the Association; and

Payment of Claims by FSLIC

RESOLVED FURTHER, That the FSLIC, in its corporate capacity, and not as Receiver ("Corporation") is hereby authorized to pay in full any claims against the

Receiver, the payment of which the Director has determined will benefit the FSLIC in its corporate capacity, as subrogee of the insured accountholders of the Association pursuant to the payment by the FSLIC of the insured accounts of the Association or as subrogee of the Federal Home Loan Bank of Dallas, *provided,* however, that no such payment shall exceed $10,000 per claimant and such payments shall not total in the aggregate more than $500,000, and *provided further,* that upon payment of each such claim, the FSLIC, in its corporate capacity, shall obtain from each such claimant an assignment of each such claim or the right to make such claim, and *provided* further, that the form of any such assignment shall be approved by the OGC; and

Implementing Authority

RESOLVED FURTHER, That the Director, Deputy Director, or Director of the Operations and Liquidations Division, Office of FSLIC or the designee of any of them ("Director") is hereby authorized to take such action as may be necessary or appropriate to carry out the obligations of the FSLIC as Receiver, pursuant to its appointment; and

RESOLVED FURTHER, That the Corporation is hereby authorized to make advances to the Receiver, evidenced by written documents, for the purpose of enabling the Receiver to perform its functions and duties, to pay costs and expenses of the receivership, and to enable the Receiver to administer or improve assets pledged to secure the repayment of obligations to the FSLIC, on such terms and conditions as the Director shall deem appropriate, and the Director may execute such documents as may be necessary to make such advances and enter into related collateral

agreements, *provided* that the final forms of any such documents or agreements have been approved by the OGC; and

RESOLVED FURTHER, That the Corporation is hereby authorized to make loans to the Receiver, evidenced by written documents, on such terms and conditions as the Director shall deem appropriate, for the purpose of enabling the Receiver to repay any claims to the extent that such claims are secured by a lien on property of the Association or in which the Association has an interest, and that such property or interest has a value equal to or greater than such secured claims, and the Director may execute such documents as may be necessary to make such loans and enter into related collateral agreements, *provided* that property securing such claims, and having a value equal to or greater than such claims, shall be pledged to the Corporation to secure the repayment of such loans made by the FSLIC to the Receiver, and *provided further* that the final forms of any documents or agreements executed pursuant to the authority of this resolving paragraph have been approved by the OGC; and

RESOLVED FURTHER, That the Corporation is hereby authorized to make loans to the Receiver, evidenced by written documents, on such terms and conditions as the Director shall deem appropriate, for the purpose of enabling the Receiver to repay Bank Advances guaranteed by the Corporation ("Guaranteed Advances"), and the Director may execute such documents as may be necessary to make such loans and enter into related collateral agreements, *provided* that property securing such Bank Advances shall be pledged to the Corporation to secure the

repayment of such loans made by the FSLIC to the Receiver, and *provided further* that any loan made by the FSLIC to the Receiver to repay Guaranteed Advances shall be an unsecured claim of the sixth category, as specified in the Bank Board resolution to be adopted immediately subsequent to this resolution, to the extent that the collateral securing such Guaranteed Advances has a value less than the amount of such advances; and *provided further* that the final forms of any documents or agreements executed pursuant to the authorization of this resolving paragraph have been approved by the OGC; and

RESOLVED FURTHER, That the Receiver is hereby authorized to repay any loans made to it by the Corporation with property, including property pledged to the FSLIC as collateral for such loans, and the Director is hereby authorized to accept such form of payment, and the Director may execute such documents or agreements as may be necessary to accomplish such repayment, *provided* that the final forms of any such documents or agreements have been approved by the OGC; and

RESOLVED FURTHER, That the Corporation is hereby authorized to obtain assignments of claims of the Receiver, and the Receiver is authorized to render such assignments to the Corporation, *provided* that the Corporation shall either pay fair value for any such claim or shall agree to pay over to the Receiver all proceeds received on the claim in excess of the expenses incurred by the Corporation in pursuing such claim, and *provided further,* that the form of any such assignment shall be approved by the OGC; and

Designation of Agents

RESOLVED FURTHER, That J.M. Belanger, Tim J. Taylor, John Vella, Donna Harrigan, and E. Kelly Jones are each hereby designated as agents of the Bank Board and the FSLIC for the purposes of acting as Special Representatives of the FSLIC as Receiver; and

Special Representatives

RESOLVED FURTHER, That one or more persons shall be designated as Special Representative of the Receiver ("SR"); that such designated person or persons shall have the power and authority to act in the name and on behalf of the Receiver, including the authority, subject to the direction of the Director, to take prompt possession of the books, records, property, and assets of every kind and description of the Association and to exercise all powers of the Receiver; that, initially, Edward F. Gerber, J.M. Belanger, Tim J. Taylor, John Vella, Donna Harrigan, E. Kelly Jones, Ann N. Barnes, James W. Wigand, John W. Sears, Thomas R. Procopio, William V. Ponds, and J. Andrew Read, each serve as SR; and that the Director may replace or remove any SR and may designate such additional SR(s) as the Director deems appropriate, prescribing the functions and responsibilities of such SR(s) as the Director deems appropriate provided, however, that any SR designated under this resolving paragraph shall not act for or on behalf of the FSLIC in its corporate capacity with regard to the Association in receivership; and

Indemnification of Special Representatives

RESOLVED FURTHER, That the Director is hereby authorized to enter into a contract on behalf of the FSLIC,

acting in its corporate capacity and not as Receiver, to indemnify, to the extent not indemnified from the assets of the Association and under applicable law, any person who is not an employee of the United States Government, or any agency thereof, and who accepts appointment to act as an SR pursuant to this Resolution, and to hold such persons harmless against any loss or liability that may arise from such person's good faith performance of his or her fiduciary duties and responsibilities as an SR; *provided* that the final form of any agreement providing for such indemnification is approved by the OGC; and

Termination of Employment Contracts

RESOLVED FURTHER, That every employment contract between the Association and its officers, employees, agents or consultants is hereby terminated by the Bank Board, effective upon the date of default of the Association; and

Records and Reports

RESOLVED FURTHER, That each SR shall keep a record of his or her actions as SR for the Receiver and shall report on such actions from time to time as directed by the Director; and

RESOLVED FURTHER, That the Director shall from time to time report to the Bank Board with respect to actions taken pursuant to this Resolution.

By the Federal Home Loan Bank Board

/s/ Jeff Sconyers
Secretary

NO. 86-14-74

COIT INDEPENDENCE JOINT VENTURE, Plaintiff,	)	IN THE DISTRICT COURT OF
vs.	)	DALLAS COUNTY, TEXAS
FIRSTSOUTH, F.A., Defendant.	)	95th JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

Coit Independence Joint Venture, Plaintiff, files this its Original Petition complaining of FirstSouth, F.A. ("FirstSouth"), Defendant, and as grounds therefor would show the following:

PARTIES

1. Plaintiff is a joint venture organized and existing in accordance with the laws of the State of Texas with its place of business in Dallas County, Texas.

2. Defendant FirstSouth is a federal association organized and existing under the laws of the United States. The principal place of business of FirstSouth is in Pine Bluff, Arkansas. FirstSouth has done business and is doing business in the State of Texas by entering into contracts with Texas residents which are performable in whole or in part in the State of Texas. FirstSouth has not designated an agent upon whom service may be made and therefore may be served by serving the Secretary of State of Texas to be forwarded to the President of FirstSouth, William Bruton, at the address of FirstSouth's principal place of business at Post Office Box 5900, Pine Bluff, Arkansas 71611.

BACKGROUND

3. In May of 1983, Plaintiff was assigned the right to purchase from the trustees of E Systems, Inc. Pool Trust, approximately 1,000 acres of land (the "Rasor tract") for approximately $20 million. The closing of the purchase of the Rasor tract was scheduled for June 1, 1983. During April and May of 1983, various entities approached representatives of Plaintiff inquiring about purchasing the Rasor tract from Plaintiff after the June 1, 1983 closing. After various meetings and discussions, an oral agreement in principle to sell the property was reached between Plaintiff and Sterling-Coit, Ltd. The agreement in principle was reduced to a written contract of sale and signed on May 26, 1983 between Plaintiff and Sterling-Coit to sell the Rasor tract at a profit of approximately $10 million. That sale was scheduled to close within seventy-five days of the date of the contract and did in fact close on August 12, 1983 when the Rasor tract was sold at a profit of approximately $10 million.

4. During March and April of 1983, Plaintiff was also seeking financing to purchase the Rasor tract for the scheduled closing of June 1, 1983. Plaintiff spoke with various lenders, and in early April of 1983, Plaintiff was put in touch with Defendant FirstSouth and one of its officers, Joel Cheatham. In seeking financing for the property, Plaintiff's representatives advised FirstSouth that there was little or no risk in loaning the money to purchase the property for the reason that Plaintiff had verbal commitments from a potential purchaser to buy the property at an approximate $10 million profit. Defendant FirstSouth, upon learning that Plaintiff would be selling the property for an approximate $10 million profit in a

very short period of time, advised Plaintiff that it would be willing to loan to Plaintiff up to an aggregate amount of $31 million if Plaintiff agreed to pay to Defendant not only the calculated interest rate at the treasury bill rate plus 4.25% but, as additional compensation for the use of the funds, a 25% "profit participation" interest and a "loan origination fee" or "commitment fee" in the approximate amount of $310,000, approximately $100,000 of which was refunded upon funding of the loan. The basic agreement between the parties is evidenced by the April 13, 1983 commitment letter, a copy of which is attached hereto as Exhibit "A" and incorporated herein by reference.

5. Thereafter, on June 1, 1983, Defendant loaned to Plaintiff the approximate amount of $20 million under the terms of the Promissory Note and Loan Agreement, true and correct copies of which are attached hereto as Exhibits "B" and "C" respectively and incorporated herein by reference. Before the funding of the loan on June 1, 1983, Plaintiff advised FirstSouth that it had executed a written contract to sell the Rasor tract to Sterling-Coit for an approximately $10 million profit with such closing to take place on or before August 12, 1983. Accordingly, before FirstSouth actually loaned the money to Plaintiff on June 1, 1983, it knew that Plaintiff already had a contract to sell the property at a substantial profit within a short period of time. As evidence of such knowledge is the letter dated May 31, 1983, a true and correct copy of which is attached hereto as Exhibit "D" and incorporated herein by reference, wherein Defendant agreed to credit or refund a portion of the "commitment fee" if Plaintiff sold the property within 90 days, as it was apparent to the parties that such sale would take place.

6. On August 12, 1983, the sale of the property to Sterling-Coit took place and the note in the approximate amount of $20 million payable to Defendant FirstSouth was paid back by Plaintiff. Thus, Defendant loaned to Plaintiff approximately $20 million on June 1, 1983 and was paid back approximately $23 million on August 12, 1983 for the use of the $20 million for a period of roughly 72 days. The $23 million figure is arrived at by adding to the $20 million loan approximately $500,000 in interest paid back plus $2.216 million in "profit." Plaintiff would further show that the "commitment fees" and "loan origination fees" and other fees charged and received by FirstSouth were not bona fide commitment fees and were not reasonably related to the value of any service performed by Defendant FirstSouth in the making of the loan since no service was performed. Such fees were in fact compensation for the loaning of money and should be deemed interest in the transaction. Accordingly, the principal amount of the loan should be reduced by the amount of loan commitment fees and loan origination fees used in the transaction for the purpose of making usury calculations.

7. On August 12, 1983, the same day as the closing of the sale by Plaintiff to Sterling-Coit of the Rasor tract, Plaintiff purchased approximately 91 acres of land located at Coit and Frankford Road in far North Dallas (the "Frankford property"). Defendant FirstSouth agreed to loan to Plaintiff in the aggregate $30 million to purchase and develop the Frankford property.

8. Under the loan agreement regarding the Frankford property, a true and correct copy of which is attached hereto as Exhibit "E" and incorporated herein by ref-

erence, Defendant FirstSouth also contracted to receive, in addition to interest, a twenty-five percent (25%) profit participation interest in the cash flow and net gain on the property. The appraised value of the Frankford property at the time the Frankford loan was closed was approximately $39 million. Additionally, FirstSouth charged and received various fees at the closing of the loan on the Frankford property which were not bona fide commitment fees or other fees for any services rendered by FirstSouth so that such fees are to be deemed interest and have the effect of reducing the principal amount of the loan to Plaintiff to a lower true principal amount for the purpose of usury calculations.

9. In making the loan to purchase the Frankford property Defendant FirstSouth represented that it would loan additional monies for the development of the property and that it would carry the loan, by executing any necessary renewal notes, for at least five years unless the property was sold prior to that time. When the Frankford note matured on August 12, 1984, Defendant FirstSouth agreed to extend the maturity date to August 12, 1985, and then subsequently to August 12, 1986. However, in addition to the interest being charged by Defendant FirstSouth, Defendant FirstSouth charged "extension fees" in the amount of $450,000 for each extension of the maturity date of the note. Additionally, Defendant First South required Plaintiff to execute promissory notes in the amount of $3,000,000 and in the amount of $4.6 million dollars and charged other fees in addition to the extension fees, all of which fees are in fact interest which render the loan transactions usurious.

10. Defendant FirstSouth further represented to Plaintiff that under the terms of the loan agreements it

would allow Plaintiff to draw down funds to make improvements to the property and would loan Plaintiff additional funds to carry the interest on the notes and would renew the notes until such time as the property could be sold. From December 1984 to August 1985, Plaintiff drew down approximately $3,000,000 to make improvements to the property, including construction of roads and thoroughfares, installation of sewer lines, and other improvements for the benefit of both Plaintiff and Defendant FirstSouth. Such improvements were made with the consent of FirstSouth. In accordance with such agreement, as shown above, FirstSouth renewed the note on two different occasions to extend the maturity date to August, 1986. However, in August, 1986 Defendant FirstSouth refused to renew the notes as it had represented it would, and has now demanded payment of the notes and has threatened to foreclose on the real property.

COUNT I.

USURY

11. Plaintiff alleges and incorporates herein by reference paragraphs 1 through 10 above.

12. With respect to the Rasor tract, Defendant FirstSouth has contracted for, charged or received interest in excess of twice the amount allowed by law, or alternatively, in excess of the amount allowed by law, by reason of the "commitment" fees, "origination" fees, other fees and "profit" received which are in reality compensation for the use of money. Accordingly, Plaintiff is entitled to recover from Defendant FirstSouth three times the amount of usurious interest contracted for, charged or

received by Defendant FirstSouth and return of all principal paid to FirstSouth and twice the amount of all interest charged or received, and its reasonable and necessary attorney fees as well as costs of suit, all of which exceed the minimum jurisdictional requirements of this Court. Alternatively, Plaintiff is entitled to recover three times the amount of usurious interest charged or received and its reasonable and necessary attorney fees.

13. Respecting the Frankford property, FirstSouth has contracted for, charged or received interest in excess of twice the amount allowed by law, or alternatively, in excess of the amount allowed by law, in contracting for a "profit participation," and in charging fees which are not reasonably related to the value of any services performed by Defendant. Accordingly, Plaintiff is entitled to the statutory penalties and recoveries at common law as outlined in paragraph 12 above.

COUNT II.

BREACH OF FIDUCIARY DUTY AND BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

14. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 10 above.

15. Alternatively, Plaintiff seeks a declaration that Defendant FirstSouth was in reality a partner with Coit Independence Joint Venture by reason of its profit sharing interest in the joint venture and by reason of the understanding of the parties that FirstSouth would act as the "financial partner" in the enterprise and the other co-venturers would act as the "service partners" to develop and market the property for resale at a profit to benefit all the venturers. As a partner, FirstSouth owes Plaintiff a fiduciary duty to deal with its partners in a manner that will not destroy or impair partnership assets. FirstSouth's failure to provide the agreed upon capital and operating contributions for the properties and to deal with its partners in a fair manner constitutes a breach of its fiduciary duty to Plaintiff and its implied duty of good faith and fair dealing.

16. As a direct and proximate result of the wrongful conduct of FirstSouth, Plaintiff has been damaged in an amount that exceeds the jurisdictional minimum of this Court.

WHEREFORE, Plaintiff respectfully requests that Defendant FirstSouth be cited to appear and answer and upon final hearing Plaintiff have judgment against FirstSouth in the amounts prayed for above, or alternatively, that Plaintiff have declaratory judgment, that the relationship between it and Defendant FirstSouth was that of partner or joint venturer and further declaration that any alleged note, deed of trust, guaranty or other document is unenforceable as a loan or guaranty against Plaintiff. Plaintiff further prays for its prejudgment and post-judgment interest as allowed by law, for damages on its usury claim according to the statute, its reasonable attorney fees, costs and such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

/s/ Paul E. Galvin by JLG
Jay L. Gueck
State Bar No. 08566800

Paul E. Galvin
State Bar No. 07601300
Of AKIN, GUMP, STRAUSS,
HAUER & FELD
4100 First City Center
1700 Pacific Avenue
Dallas, Texas 75201-4618
Telephone: (214) 969-2800
ATTORNEYS FOR
PLAINTIFF

VERIFICATION

THE STATE OF TEXAS)
)
COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, on this day personally appeared Charles C. Taylor, who being first duly sworn, upon his oath stated he is a Managing Joint Venturer of Coit Independent [sic] Joint Venture, that he has authority to execute this Verification, that he has knowledge of the facts set forth in paragraphs 1-13 of Plaintiff's Original Petition, and that the facts stated therein are true and correct.

/s/ Charles C. Taylor
Charles C. Taylor

SUBSCRIBED AND SWORN TO BEFORE ME this 24th day of October, 1986.

/s/ Sandra L. Howerton
Notary Public in and
for the State of Texas

Sandra L. Howerton

My commission expires:
August 29, 1989

NO. 86-14274

COIT INDEPENDENCE JOINT VENTURE,	)	IN THE
	)	DISTRICT
Plaintiff	)	COURT OF
	)	
VS.	)	DALLAS
	)	COUNTY, TEXAS
FIRSTSOUTH, F.A.,	)	
	)	95TH JUDICIAL
Defendant	)	DISTRICT

DEFENDANT'S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, FIRSTSOUTH, F.A. ("FIRSTSOUTH"), Defendant in the above entitled and numbered cause, and for answer to Plaintiff's Original Petition would respectfully show the Court as follows:

I.

FIRSTSOUTH avails itself of its rights under Rule 92, Tex. R. Civ. P., to file a General Denial and deny all, each and every allegation contained in Plaintiff's Petition and demand strict proof thereof.

WHEREFORE, PREMISES CONSIDERED, FIRSTSOUTH prays for judgment of the Court that Plaintiff take nothing by its suit, and that FIRSTSOUTH go hence with its costs without day, and for such other and further relief at law or in equity as to which it may show itself entitled.

Respectfully submitted,
VINSON & ELKINS

By: /s/ Kenneth E. John, Jr.
State Bar No. 10677000
2020 LTV Center
2001 Ross Avenue
Dallas, Texas 75201-2916
(214) 979-6601

ATTORNEY FOR FIRSTSOUTH, F.A.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copy of the above and foregoing document was sent by Certified Mail, Return Receipt Requested, to counsel of record, as follows, on this — day of December, 1986.

/s/ Kenneth E. Johns, Jr.
Kenneth E. Johns, Jr.

CERTIFIED MAIL

Mr. J. L. Gueck
Akin, Gump, Strauss,
Hauer & Feld
4100 First City Center
1700 Pacific Avenue
Dallas, TX 75201-4618

Mr. Paul E. Galvin
Akin, Gump, Strauss,
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1700 Pacific Avenue
Dallas, TX 75201-4618

ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Coit Independence Joint Venture, Plaintiff,	)	
v.	)	Civil Action No. 3-86-3185-R
FIRSTSOUTH, F.A., Defendant.	)	

MOTION OF FSLIC TO
DISMISS PLAINTIFF'S COMPLAINT

The Federal Savings and Loan Insurance Corporation ("FSLIC"), an agency of the United States Government, in its capacity as Receiver for FIRSTSOUTH, F.A. ("FIRSTSOUTH") hereby moves to dismiss the complaint brought against it in this matter by plaintiff pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. In support of this motion, FSLIC states as follows:

1. In December 4, 1986, the Federal Home Loan Bank Board ("Bank Board") appointed the FSLIC Receiver for FIRSTSOUTH pursuant to 12 U.S.C. § 1464(d)(6)(A) and 12 U.S.C. § 1464(d)(6)(B)(i). The grounds for appointment of the Receiver included that the liabilities of FIRSTSOUTH exceeded its assets. A copy of the Resolution of the Bank Board appointing FSLIC as Receiver is attached hereto as Exhibit A.

2. As Receiver, FSLIC is required to collect all obligations and money due the association and to discharge

and pay off any claims of any nature against the assets or property of the association. 12 U.S.C. § 1729(b)(1)(A) and (B), 12 C.F.R. 547-549. By operation of law, FSLIC as Receiver is a party to this action. 12 C.F.R. § 547.7.

3. As as a result of FSLIC's appointment as Receiver for FIRSTSOUTH, FSLIC has the exclusive power to determine all claims against FIRSTSOUTH, and all claims, including litigation pending against FIRSTSOUTH, must be referred to a comprehensive administrative claims procedure established under federal regulations and statutes. 12 C.F.R. § 549; *North Mississippi Savings & Loan Ass'n. v. Hudspeth*, 756 F. 2d 1096 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 790 (1986).

4. The statute which authorizes the Bank Board to appoint FSLIC as Receiver also prohibits any judicial interference with the administrative claims procedure. Under 12 U.S.C. § 1464(d)(6)(C), no court has jurisdiction to hear claims against an association in receivership except appeals from decisions of FSLIC which have first been appealed to the Bank Board in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

5. FSLIC's memorandum of law in further support of this motion will be filed in accordance with a briefing schedule set by this Court.

WHEREFORE, FSLIC as Receiver respectfully requests this Court to dismiss plaintiff's complaint.

Respectfully submitted,

By: /s/ J. K. Ivey
One of the Attorneys for
the Federal Savings and
Loan Insurance
Corporation as Receiver
for FIRSTSOUTH, F.A.

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Peter F. Lovato, III
Albert C. Maule
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(713) 220-4200

Of Counsel:

Harry W. Quillian
William K. Black
Thomas J. Segal
John Beaty
Federal Home Loan
Bank Board
Office of General Counsel
1700 G Street, N.W.
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Motion of FSLIC as Receiver to Dismiss Plaintiff's Complaint has been delivered by messenger this the 19th day of February, 1987, to all attorneys of record.

/s/ J. K. Ivey

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COIT INDEPENDENCE JOINT VENTURE,	)	
Plaintiff,	)	
v.	)	CA 3-86-3185-R
FIRSTSOUTH, F.A.,	)	
Defendant.	)	

ORDER

(Filed February 25, 1987)

In *North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), cert. denied, 106 S.Ct. 790 (1986), the Fifth Circuit held that the FSLIC has the exclusive power to determine *all* claims—including those raised in litigation—against the FSLIC, as receiver for a savings and loan association. This Court, as it must, followed *Hudspeth* in *Glen Ridge I Condominiums v. FSLIC*, CA 3-85-1709-R (N.D. Tex. Sept. 27, 1985), and Judge Fish did the same in *Zervas v. Falkner*, CA 3-84-0238-G (N.D. Tex. Sept. 30, 1985).

The FSLIC has been appointed as receiver for FirstSouth. Accordingly, the Motion of the FSLIC to Dismiss the Plaintiff's Complaint is GRANTED.[1]

---

[1]This order is being entered *before* the expiration of the twenty (20) day period for the plaintiff's response—in an attempt to save expense and attorneys fees for the plaintiff in

(Continued on following page)

SIGNED this 25th day of February, 1987.

/s/ Jerry Buchmeyer
UNITED STATES DISTRICT JUDGE

(Continued from previous page)

filing a needless response—since any attempt to obtain a reversal of *Hudspeth* must be addressed to the Fifth Circuit. However, if the plaintiff does wish to file a reply to the motion to dismiss, the reply will be treated as a motion for reconsideration of this Order.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COIT INDEPENDENCE JOINT VENTURE,	)	
Plaintiff,	)	
vs.	)	CA No. 3-86-3185-R
FIRSTSOUTH, F.A.,	)	
Defendant.	)	

COIT INDEPENDENCE JOINT VENTURE'S MOTION FOR RECONSIDERATION AND RESPONSE TO MOTION OF FSLIC TO DISMISS

(Filed March 18, 1987)

Coit Independence Joint Venture ("Coit"), plaintiff herein, hereby moves the Court to reconsider its Order of February 25, 1987 dismissing the Plaintiff's Complaint and responds to the Motion of FSLIC to Dismiss Plaintiff's Complaint on the grounds and for the reasons set forth below:

I.

1. Removal of this action was not properly effected prior to February 25, 1987, the date on which this Court entered its Order dismissing this action. The defects in the removal are adequately explained in Coit's Motion to Vacate filed herein on March 10, 1987, and in Coit's Motion for Removal filed herein on March 13, 1987, which Motions are incorporated herein by reference. Therefore, for the reasons stated in these prior Motions, Coit requests that the Court reconsider and vacate its Order of February 25, 1987.

II.

2. Coit agrees with the recitation of facts contained in paragraphs 1 and 2 of the Motion of the Federal Savings and Loan Corporation ("FSLIC") to Dismiss Plaintiff's Complaint. Coit, however, vigorously contests the significance FSLIC attached to those facts and FSLIC's interpretation of the law applicable to this Court's jurisdiction.

3. FSLIC contends in its Motion that FSLIC (more properly the Federal Home Loan Bank Board, hereinafter referred to as "FHLBB") has exclusive power to adjudicate all litigation pending against FirstSouth and that all such litigation must be referred to the FHLBB pursuant to the claims process set forth in 12 C.F.R. § 549 *et seq.* in accordance with the procedures established by the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (the "APA"). This contention is founded solely on the language of 12 U.S.C. § 1464(d)(6)(C) as interpreted in *North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, — U.S. —, 106 S.Ct. 790 (1986). The premise of FSLIC's contention is the assertion that no court has original jurisdiction of claims against a savings and loan that has been placed in receivership.

4. The most recent pronouncement of a U.S. Court of Appeals on this issue, however, severely undermines the authority of *Hudspeth* and conclusively refutes the proposition that the statutory scheme delineating FSLIC's authority as a receiver was intended to grant FSLIC adjudicatory power over such claims against a savings and loan in receivership. *Morrison-Knudsen Co. Inc. v. CHG*

International, Inc., No. 86-2063, slip op. (9th Cir. February 25, 1987) (available March 2, 1987, on Lexis, Genfed library, US App file). A copy of this opinion is attached as Appendix A to the Brief in Support of this Motion. Consequently, the statutory scheme does not deprive this Court of jurisdiction over Coit's claim against First South.

5. In any event, *Hudspeth* is factually distinguishable from the instant case.

III.

6. Alternatively, under *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), *Hudspeth's* interpretation of 12 U.S.C. § 1464 violates Article III of the U.S. Constitution by vesting judicial power over a claim arising under state law in an administrative body, namely, the FHLBB. *Glen Ridge I Condominiums, Ltd. v. FSLIC*, No. 05-85-00873-CV, slip op. (Tex. Civ. App.—Dallas, December 30, 1986). A copy of this opinion is attached to the Brief as Appendix B. Thus, while the *CHG* court saw fit to avoid the constitutional issue by rejecting *Hudspeth*, if this court finds itself bound to *Hudspeth's* interpretation of the statutory scheme, this Court may and should nonetheless exercise jurisdiction over this matter by following *Northern Pipeline* and *Glen Ridge*. *Hudspeth* is therefore distinguishable since no constitutional issue was raised before the Fifth Circuit.

IV.

7. In the second alternative, *Hudspeth's* interpretation of the statutory scheme deprives Coit of its Seventh Amendment right to a trial before a jury. Shifting this

action to the administrative track under the APA limits federal court jurisdiction to, at best, a review of the FHLBB's ruling by a U.S. Court of Appeals to determine if the ruling is supported by "substantial evidence." *See* 12 U.S.C. §§ 1464(d)(7)(A)-(B); 5 U.S.C. § 706(2)(E); *CHG*, slip op. at 27, n. 5. Thus, no jury trial, or even an evidentiary hearing, would be available to Coit at any stage of the administrative process. *Id.* The Seventh Amendment protects Coit from the evidentiary limits of so summary a process.

V.

THEREFORE, Coit moves this Court to reconsider and vacate its order of February 25, 1987 dismissing this action and to deny FSLIC's Motion to Dismiss.

Respectfully submitted,

/s/ Jay L. Gueck
State Bar No. 08566800
Paul E. Galvin
State Bar No. 07601300
Jeffrey C. Glass
State Bar No. 08004000
of AKIN, GUMP, STRAUSS, HAUER & FELD
4100 First City Center
1700 Pacific Avenue
Dallas, Texas 75201-4618
(214) 969-2800

ATTORNEYS FOR PLAINTIFF COIT INDEPENDENCE JOINT VENTURE

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Motion and Response has been served upon all counsel of record in

accordance with the Federal Rules of Civil Procedure on this 18th day of March, 1987.

/s/ Jeffrey C. Glass

CERTIFICATE OF CONFERENCE

I certify that, pursuant to Local Rule 5.1(a), on March 12 and 13, 1987, I conferred with Mr. J.K. Ivey, counsel for Defendant herein, concerning the foregoing Motion and he informed me that he would oppose it.

/s/ Jeffrey C. Glass

jcg.docs.MotRecon

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COIT INDEPENDENCE JOINT VENTURE, Plaintiff,	)	
vs.	)	CA NO. 3-86-3185-R
FIRSTSOUTH, F.A., Defendant.	)	

NOTICE OF APPEAL

(Filed March 27, 1987)

Notice is hereby given that Coit Independence Joint Venture, plaintiff in the above-named action, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order dismissing plaintiff's action, entered herein on the 25th day of February, 1987.

Respectfully submitted,

/s/ Paul E. Galvin
State Bar No. 07601300
Jeffrey C. Glass
State Bar No. 08004000
of AKIN, GUMP, STRAUSS,
HAUER & FELD
4100 First City Center
1700 Pacific Avenue
Dallas, Texas 75201-4618
(214) 969-2800
ATTORNEYS FOR
PLAINTIFF COIT
INDEPENDENCE JOINT
VENTURE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure on this 27th day of March, 1987.

/s/ Paul E. Galvin

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COIT INDEPENDENCE JOINT VENTURE,	)	
Plaintiff,	)	Civil Action
v.	)	No. 3-86-3185-R
FIRSTSOUTH, F.A.,	)	
Defendant.	)	

FSLIC'S RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION

(Filed April 7, 1987)

The Federal Savings and Loan Insurance Corporation ("FSLIC"), as Receiver for FirstSouth, F.A. ("FirstSouth"), submits this its Response to Plaintiff's March 18, 1987, Motion for Reconsideration and Response to Motion of FSLIC to Dismiss.

Background

On February 19, 1987, FSLIC filed its Motion to Dismiss Plaintiff's complaint for lack of subject matter jurisdiction on the ground that claims such as those raised in Plaintiff's complaint rest exclusively with FSLIC and its supervisory authority, the Federal Home Loan Bank Board ("Bank Board"). 12 U.S.C. § 1464(d)(6)(C); 12 U.S.C. § 1929(b)(1)(A) and (B). *See: North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985).

On February 25, 1987, this Honorable Court entered its Order granting FSLIC's Motion to Dismiss based on

Hudspeth and this Court's prior opinion in *Glen Ridge I Condominiums v. FSLIC*, CA3-85-1709-R (N.D. Tex., September 27, 1985). This Honorable Court noted that:

> 1. This Order is being entered *before the expiration* of the twenty (20) day period for the plaintiff's response—in an attempt to save expense and attorneys fees for the plaintiff in filing a needless response—since any attempt to obtain a reversal of *Hudspeth* must be addressed to the Fifth Circuit.

Order, p. 1.

On March 18, 1987, Plaintiff filed its Motion for Reconsideration and Response to Motion of FSLIC to Dismiss, citing the following non-Fifth Circuit authorities as grounds for reconsideration: *Morrison-Knudsen Co., Inc. v. CHG International, Inc.*, No. 86-2063, Slip Op. (9th Cir., February 25, 1987), and *Glen Ridge I Condominiums, Ltd. v. FSLIC*, No. 05-85-00873-CV, Slip Op. (Tex. Civ. App.-Dallas, December 30, 1986). Plaintiff's motion is procedurally and legally in error.

Plaintiff's Motion is Untimely

This Honorable Court's Order of Dismissal was entered on the Court's docket pursuant to Federal Rules of Civil Procedure 58 and 79(a) on February 25, 1987. An order dismissing a plaintiff's complaint without leave to amend is a dispositive trial court determination of law. *Stevenson v. Calpine Conifers II, Ltd.*, 652 F.2d 808, 811 (9th Cir. 1981). Federal Rule of Civil Procedure 59(e) provides:

> A motion to alter or amend judgment shall be served not later than ten days after entry of judgment.

Plaintiff's Motion for Reconsideration was not filed until March 18, 1987, some twenty-one days after this

Court's entry of judgment, and well beyond the time limit prescribed by Rule 59(e). Rule 6(b) of the Federal Rules of Civil Procedure prohibits enlargement of this time period, and the Court cannot allow such time period to be circumvented. *Armstrong v. Tennessee Valley Authority*, 536 F.Supp. 9, 11 (E.D. Tenn. 1980).

As explained by the court in *Roque v. City of Redlands*, 79 F.R.D. 433 (C.D. Cal. 1978):

> . . . Rule 59(e) of the Federal Rules of Civil Procedure permits the court to alter or amend a judgment. While Rule 59 motions are usually utilized following a trial, such motions are also permissible in cases, such as this, in which the court enters an order of dismissal. Rule 59(e) specifies, however, that motions to alter or amend a judgment 'shall be served not later than ten days after entry of the judgment.'
>
> In this case, the order of dismissal which Plaintiff seeks to alter was entered on June 14, 1987 . . . the Plaintiff served a motion [to amend] fourteen days after the entry of the order . . . For this reason, the Court must deny the motion to alter the judgment insofar as it rests upon Rule 59(e).

79 F.R.D. 433 at 435. *See accord: Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1112 (7th Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 1758 (1985).

While Plaintiff's Motion to Reconsider is not couched as a Rule 60 motion for relief due to mistake, inadvertence, excusable neglect, etc., it is important to note that such a motion would be inappropriate in any event. Rule 60 may be used to vacate an order of dismissal for lack of subject matter jurisdiction only on narrow grounds and upon a showing of exceptional circumstances. *Andrews v. Heinhold Commodities, Inc.*, 791 F.2d 1334 (7th Cir. 1985).

Rule 60(b) was not designed to supersede the normal and ordinary channels of appellate relief. *Loucke v. U.S.*, 21 F.R.D. 305 (D.C. N.Y. 1957). It cannot be used as a substitute for appeal, and absent exceptional and compelling circumstances, a party will not be granted leave from a judgment even though relief from the judgment might have been obtained had an appeal been taken. *Roque v. City of Redlands*, 79 F.R.D. 433, 435 (C.D. Cal. 1978). A party may not avoid the time limitations of Rule 59 by filing a Rule 60 motion for review of judgment. *U.S. v. Hall*, 463 F.Supp. 787 (D.C. Mo. 1978) *aff'd*, 588 F.2d 1214 (8th Cir. 1978).

As the foregoing authorities indicate, the procedural delinquency of Plaintiff's Motion to Reconsider prevents it from being considered by this Honorable Court.

This Honorable Court is Bound to Follow Fifth Circuit Precedent

Notwithstanding the foregoing, Plaintiff's Motion for Reconsideration is legally inadequate because it requests this Court to vacate its order on the basis of rulings of other courts that directly contradict with prior Fifth Circuit precedent. As this Court correctly noted in its Order of February 25, 1987: "Any attempt to obtain a reversal of *Hudspeth* must be addressed to the Fifth Circuit."

A district court cannot shape decisional law by overruling circuit precedent because it lacks power to do so, and merely applies the law as it finds it. *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638 (4th Cir. 1975); *Kennard v. United Parcel Service, Inc.*, 531 F.Supp. 1139 (D.C. Mich. 1982).

The rule of *stare decisis* in the Fifth Circuit is clear: No court is at liberty to alter the law of the circuit until the Supreme Court or the *en banc* circuit court so instruct. *U.S. v. Albert*, 675 F.2d 712 (5th Cir. 1982); *Howard v. Gonzales*, 658 F.2d 352 (5th Cir. 1981). Even if the Ninth Circuit's opinion in *Morrison-Knudsen Co., Inc. v. CHG International, Inc.* "conclusively refutes the proposition that the statutory scheme delineating FSLIC's authority as receiver was intended to grant FSLIC adjudicatory power over such claims," as argued by Plaintiff in its Motion for Reconsideration, this Honorable Court is bound to follow this Circuit's directives in *North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), until such time, if any, that the Fifth Circuit *en banc* readdresses the question.

Plaintiff's reliance on *Glen Ridge I Condominiums, Ltd. v. FSLIC*, No. 05-85-00873-CV, Slip Op. (Tex. Civ. App. - Dallas, December 30, 1986) is even more misplaced. This Honorable Court is more than familiar with the history of the *Glen Ridge* case. *See: Glen Ridge I Condominiums, Ltd. v. FSLIC*, CA3-85-1709-R (N.D. Tex., September 27, 1985). A federal district court is not bound by *stare decisis* to follow state court interpretations of federal law. *Ute Indian Tribe v. State of Utah*, 521 F.Supp. 1072 (D. Utah 1981), *aff'd in part, rev'd in part*, 716 F.2d 1298 (10th Cir. 1983). Just as the decisions of another circuit cannot override the determinations of the Fifth Circuit, this Court may not be bound by the ruling of a state court of appeals concerning a question of federal law.

WHEREFORE, Defendant FSLIC prays that Plaintiff's Motion for Reconsideration and Response to Motion of FSLIC to Dismiss be denied.

Dated: April 6, 1987

Respectfully submitted,

By: J. K. Ivey
One of the Attorneys for
the Federal Savings and
Loan Insurance
Corporation, as Receiver
for FIRSTSOUTH, F.A.

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Peter F. Lovato, III
Albert C. Maule
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Dorothy L. Nichols
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John Beaty
Office of General Counsel
Federal Home Loan
Bank Board
1700 G Street, N.W.
Washington, D.C. 20552

CERTIFICATE OF SERVICE

The undersigned does hereby certify a true and correct copy of the foregoing document was forwarded to all counsel of record on this the 7th day of April, 1987.

/s/ J. K. Ivey.
J. K. Ivey

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COIT INDEPENDENT JOINT VENTURE, Plaintiff,	)	
vs.	)	Case No. CA 3-86-3185-R
FIRSTSOUTH, F.A., Defendant.	)	

ORDER

(Filed April 9, 1987)

Plaintiff Coit Independent Joint Venture moves this Court to Reconsider and Vacate its Order of February 25, 1987 dismissing this action, and to Remand this action to state court. Upon consideration of the Motions, the Responses thereto, and all relevant authority, this Court is of the opinion that both of Plaintiff's Motions should be denied; it is therefore

ORDERED that Plaintiff's Motion to Reconsider and Vacate and its Motion to Remand shall be and hereby are DENIED, and it is further

ORDERED that the Court's Order of February 25, 1987 dismissing this action shall not be disturbed.

Signed this 9th day of April, 1987.

/s/ Jerry Buchmeyer
UNITED STATES DISTRICT JUDGE

Certified a true copy of an instrument on file in my office on 5-6-87. NANCY HALL DOHERTY, Clerk, U.S. District Court, Northern District of Texas.

By /s/ Barbara Howell
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COIT INDEPENDENCE JOINT VENTURE, Plaintiff,	)	Civil Action No. 3-86-3185-R
vs.	)	
FIRSTSOUTH, F.A., Defendant.	)	

NOTICE OF APPEAL

(Filed April 23, 1987)

Notice is hereby given that Coit Independence Joint Venture, Plaintiff in the above-named action, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order dismissing plaintiff's action, entered herein on the 25th day of February, 1987, and the Order denying Plaintiff's Motion to Reconsider and Vacate and its Motion to Remand entered herein on April 9, 1987.

Respectfully submitted,

/s/ Paul Galvin
Of AKIN, GUMP, STRAUSS, HAUER & FELD
4100 First City Center
1700 Pacific Avenue
Dallas, Texas 75201-4618
Telephone: (214) 969-2800

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that a copy of this document was served upon the attorneys of record for all parties in accordance with the Rules of Civil Procedure, on this 23 day of April 1987.

/s/ Paul Galvin

NOTICE OF APPEAL—Solo Page

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1218

COIT INDEPENDENCE JOINT VENTURE,

Plaintiff-Appellant,

versus

FIRSTSOUTH, F.A.,

Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Texas

(Filed February 10, 1988)

ORDER:

IT IS ORDERED that the motion of appellant to recall the Court's mandate is DENIED

IT IS FURTHER ORDERED that the motion of appellant to enlarge the time for the filing of a petition for rehearing and suggestion for rehearing en banc is DENIED

/s/ Sam Johnson
UNITED STATES CIRCUIT JUDGE
2-8-88

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 7, 1988

Mr. Robert E. Goodfriend
4100 First City Center
1700 Pacific Avenue
Dallas, TX 75201-4618

Re: Coit Independence Joint Venture,
v. Federal Savings and Loan Insurance
Corporation, as Receiver of
FirstSouth, F.A. No. 87-996

Dear Mr. Goodfriend:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk
/s/ Joseph F. Spaniol, Jr.